Artesia Ready Mix Concrete, Inc.; The Artesia Companies, Inc.; and Artesia Ready Mix Concrete, Inc./The Artesia Companies, Inc. *and* Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO. Cases 32–CA–18823–1 and 32–CA–19385–1

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The General Counsel in this case seeks a default judgment[1] on the ground that the Respondent has failed to file an answer to the complaint. On a charge and an amended charge filed by the Union on April 4, 2001, and January 24, 2002, respectively, in Case 32–CA–18823–1, and a charge and amended charge filed by the Union on January 29, and March 18, 2002, respectively, in Case 32–CA–19835–1, the General Counsel issued an order consolidating cases, amended complaint and notice of hearing on April 30, 2002, against Artesia Ready Mix Concrete, Inc. (Artesia Ready Mix); The Artesia Companies, Inc. (Artesia Companies); and Artesia Ready Mix Concrete, Inc./The Artesia Companies, Inc. (Artesia Ready Mix/Artesia Companies), collectively the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On June 14, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On June 19, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Default Judgment disclose that the Region, by letter dated June 4, 2002, notified the Respondent that unless an answer were received by June 11, 2002, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file an answer, and for the reasons further set forth below, we grant the General Counsel's Motion for Default Judgment in its entirety.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Artesia Ready Mix, a California corporation, with an office and place of business in Tulare, California, has been engaged in the manufacture and nonretail and retail distribution of ready mix concrete and related products.

During the 12-month period preceding issuance of the complaint, Artesia Ready Mix, in the course and conduct of its business operations, sold and shipped goods valued in excess of $50,000 directly to customers or business enterprises inside the State of California who themselves meet one of the Board's jurisdictional standards, other than the direct inflow or indirect outflow standards.

At all times material, Artesia Companies, a California corporation, with an office and place of business in Tulare, California, has been engaged in the manufacture and nonretail and retail distribution of ready mix concrete and related products.

During the 12-month period preceding issuance of the complaint, Artesia Companies, in the course and conduct of its business operations, sold and shipped goods valued in excess of $50,000 directly to customers or business enterprises inside the State of California who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards.

At all material times, Artesia Ready Mix and Artesia Companies have been affiliated business enterprises with common officers, ownership, directors, management, and supervision and have formulated and administered a common labor policy.

Based on their operations described above, Artesia Ready Mix and Artesia Companies (herein above and hereinafter referred to as "Artesia Ready Mix/Artesia Companies"), have constituted a single-integrated business enterprise and a single employer within the meaning of the Act.

We find that Respondent Artesia Ready Mix/Artesia Companies, is now, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

At all material times, the following-named individuals have occupied the positions set forth opposite their respective names, and are now, and/or have been at all ma-

[1] The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer. Accordingly, we construe the General Counsel's motion as a Motion for Default Judgment.

terial times, supervisors of Artesia Ready Mix and of Artesia Ready Mix/Artesia Companies within the meaning of Section 2(11) of the Act and agents of Artesia Ready Mix and of Artesia Ready Mix/Artesia Companies within the meaning of Section 2(13) of the Act:

Rune Kraft	Owner, Chief Executive Officer
Al Oliver	President
James Pennington	General Manager
Diane Yunt	Director of Human Resources

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of Artesia Ready Mix constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees and drivers employed at Artesia Ready Mix's Tulare, Farmersville, Lemoore, Woodlake (Dry Creek) and Pixley, California facilities; excluding all other employees, guards, and supervisors as defined in the Act.

Since at least June 19, 1998, and at all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit, and since that date the Union has been recognized as such representative by Artesia Ready Mix. Such recognition has been embodied in a collective-bargaining agreement, called the Agreement, which was effective for the period June 19, 1998, through December 31, 2000.

At all times since at least June 19, 1998, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to pay, wages, hours of employment, and other terms and conditions of employment.

On numerous occasions since late 2000, the Union and Artesia Ready Mix met to negotiate a successor collective-bargaining agreement to the Agreement.

During the entire course of the negotiations, Artesia Ready Mix and/or Artesia Ready Mix/Artesia Companies failed to invest Artesia Ready Mix's bargaining representatives with sufficient authority to conduct meaningful bargaining in the negotiations.

During the entire course of the negotiations, Artesia Ready Mix and/or Artesia Ready Mix/Artesia Companies has diverted income and assets of Artesia Ready Mix to Artesia Companies, and/or to Artesia Ready Mix/Artesia Companies while simultaneously misrepresenting Artesia Ready Mix's financial condition to the Union, all in order to avoid Artesia Ready Mix's obligation to bargain with the Union in good faith.

The Union did not know of the acts and conduct described above until a date in November 2001.

On numerous occasions since June 29, 2001, and continuing to date, Artesia Ready Mix and/or Artesia Ready Mix/Artesia Companies assigned unit work to nonunit employees, called the "work assignment transfers."

The work assignment transfers relate to the wages, rates of pay, hours of employment. and other terms and conditions of employment of the Unit and are a mandatory subject for the purposes of collective bargaining.

Artesia Ready Mix and/or Artesia Ready Mix/Artesia Companies engaged in the work assignment transfers without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain as the exclusive representative of the employees in the Union with respect to the work assignment transfers and their effects.

Since on or about March 19, 2001, the Union, by letter, has requested that Artesia Ready Mix provide it with certain information relating to the relationship between Artesia Ready Mix and Artesia Companies. The information is necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of employees in the unit.

Since on or about March 19, 2001, Artesia Ready Mix has failed and refused, and continues to fail and refuse, to provide the Union with the information it requested.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (5), and (d), and Section 2(6) and (7) of the Act.

Our dissenting colleague would deny the General Counsel's Motion for Default Judgment with respect to the allegation that the Respondent failed to provide information regarding the relationship between Artesia Ready Mix Concrete, Inc., and the Artesia Companies. In his view, the complaint is not well pleaded and therefore it cannot support a default judgment. Our colleague observes that an employer is under no duty to furnish information relating to nonunit matters unless the union demonstrates the relevance of the information at the time of the request. In our colleague's view, because the complaint fails to recite that the Union made such a demonstration to the Respondent, it is not well pleaded.

We disagree. The central fact of this case is that the Respondent has failed to file an answer to the complaint,

and has thereby effectively admitted all the complaint allegations. See Section 102.20 of the Board's Rules and Regulations. Thus, the Respondent admits that the Union is the exclusive bargaining representative of its employees in an appropriate unit; that about March 19, 2001, the Union requested the Respondent to "provide it with certain information relating to the relationship between Artesia Ready Mix and Artesia Companies;" that all the requested information is "necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of employees in the Unit;" that since about March 19, 2001, the Respondent has failed and refused to furnish the Union with the requested information; and that, by this conduct, it violated Section 8(a)(5) and (1) of the Act. Under the Board's decisions, the Respondent's admission of these complaint allegations amply supports an unfair labor practice finding. See, e.g., *SS & E Electric, Inc.*, 338 NLRB No. 149 (2003) (not reported in Board volumes); *U.S. Electric, Inc*., 339 NLRB No. 52 (2003) (not reported in Board volumes); *Hastings Industrie*s, 338 NLRB 861 fn. 2 (2003); and *Tower Automotive*, 322 NLRB 499, 500 (1996) (default summary judgment granted with respect to the union's request for nonunit information based on the complaint's allegation of relevance).[2]

Our colleague's contrary view is based on a mistaken view of what constitutes a well-pleaded complaint under the Board's law and procedures. It is those standards of course, which govern this case. Section 102.15 of the Board's Rules and Regulations requires only that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." Applying this rule, the Board and the courts have consistently found that an unfair labor practice complaint is not judged by the strict standards applicable to certain pleadings in other, different legal contexts. As the Sixth Circuit stated over 60 years ago:

> The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.

NLRB v. Piqua Munising Wood Products Co., 109 F.2d 552, 557 (6th Cir. 1940).[3]

Our colleague's position with respect to pleading requirements is apparently derived from his dissatisfaction with the Board's default judgment procedures which are governed by Sections 102.20 and 102.56 of the Board's Rules and Regulations, and from his preference for the approach taken under the Federal Rules of Civil Procedure.[4] But there are critical distinctions between the Board's administrative process and civil litigation in federal court. See *Morgan's Holiday Markets*, 333 NLRB 837, 839 (2001). As the Board recently explained in response to our colleague's similar arguments in *Patrician Assisted Living Facility*, 339 NLRB 1153 (2003):

> In Federal civil litigation, service of the complaint is the defendant's first notice of a legal claim against it. In contrast, the Board's process begins with the filing of an unfair labor practice charge, by a private party.

[2] *Excel Rehabilitation & Health Center*, 336 NLRB No. 10 (2001) (not reported in Board volumes), cited by our colleague, is clearly distinguishable. In *Excel*, a test-of-certification summary judgment case, the respondent filed an answer denying the relevance of the subcontracting information sought by the Union. Thus, the respondent in *Excel* put the relevance of the requested information in issue, and in that circumstance the Board deemed summary judgment inappropriate. Here, in contrast, the Respondent has not contested the relevancy of the nonunit information. Indeed, by its failure to file an answer, the Respondent has admitted not only that the nonunit information is relevant to the Union's performance of its collective-bargaining duties, but also that Respondent violated the Act by refusing to provide that relevant information.

[3] See also *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994) (complaint need not include legal theory); *Curtiss-Wright Corp., Wright Aeronautical Division v. NLRB*, 347 F.2d 61, 72 (3d Cir. 1965) (complaint "need state only the manner by which the unfair labor practice has been or is being committed"); *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 799–800 (7th Cir. 1951), affd. 345 U.S. 100 (1953) (quoting *Piqua Munising Wood Products*, supra); *NLRB v. Red Arrow Freight Lines, Inc.*, 180 F.2d 585, 587 (5th Cir. 1950) cert. denied 340 U.S. 823 (1950); ("strictness of common law pleading" inapplicable); *Consumers Power Co. v. NLRB*, 113 F.2d 38, 43 (6th Cir. 1940) ("[m]atters of evidence need not be recited in the complaint"); *Coulter's Carpet Service*, 338 NLRB 732, 735 (2002); and *Boilermakers Local 363 (Fluor Corp.)*, 123 NLRB 1877, 1913 (1959).

[4] See, e.g., *KBI Security Service v. NLRB*, 91 F.3d 291, 295 (2d Cir. 1996) (upholding Board decision deeming allegations admitted under Sec. 102.20); and *Father & Sons Lumber v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (affirming default judgment for failure to file a timely answer to backpay specification under Sec. 102.56). See also *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 831 (9th Cir. 1991); *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1320–1321 (7th Cir. 1986); *NLRB v. Aaron Convalescent Home*, 479 F.2d 736, 738 (6th Cir. 1973).

> See id. The General Counsel, a neutral government official, investigates that charge, which necessarily brings him into contact with the respondent. Only if and when the General Counsel determines that there is reasonable cause to believe that the Act has been violated does he issue a complaint. Thus, by the time a respondent is served with the complaint, it has long been given the opportunity to present its position to the General Counsel. Accordingly, when the respondent fails to file a timely answer to the complaint, despite repeated warnings of the consequences, the situation is not analogous to that of a defendant in civil litigation. The administrative process has been under way for a significant period.

339 NLRB at 1154. See also *Piqua Munising Wood Products*, supra, 109 F.2d at 557 (observing that Board's proceedings are taken in the public interest).

Applying these principles, we find that the complaint here provided the Respondent with sufficient notice of the basis of the General Counsel's claim. Thus, as indicated above, the complaint alleges that the Union is the exclusive bargaining representative; that the Union requested the Respondent to provide it with information relating to the relationship between Artesia Ready Mix and Artesia Companies; that the requested information is necessary and relevant; that the Respondent has failed to furnish the requested information; and that the Respondent has thereby violated Section 8(a)(5) and (1) of the Act. There is no unfairness then, in holding the Respondent liable based on its failure to respond.

It is true that, *had the Respondent answered the complaint and placed the matters in issue*, the General Counsel would have had to present evidence either: (1) that the Union demonstrated the relevance of the nonunit information at the time of the request; or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances.[5] However, it was not necessary to allege such facts in order to place the Respondent on notice of the claim against it. Our dissenting colleague mistakes an evidentiary requirement for a pleading requirement. See generally *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (Title VII complaint need not plead facts establishing prima facie case). Further, even assuming, arguendo, that it was necessary to allege such facts, we find, consistent with the Board precedent cited earlier,[6] that they may be reasonably inferred from the allegations that the requested information is relevant and necessary and that the Respondent unlawfully refused to provide it.

In sum, contrary to our colleague, we find that the complaint allegation that the Respondent failed to provide information regarding the relationship between Artesia Ready Mix Concrete, Inc., and the Artesia Companies is "well pleaded." As a result, a default judgment based on the Respondent's failure to answer the complaint is proper.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (5) by: (1) failing to invest its bargaining representatives with sufficient authority to conduct meaningful bargaining in the negotiations; (2) diverting income and assets while misrepresenting its financial condition to the Union in order to avoid its obligation to bargain with the Union; (3) assigning unit work to nonunit employees; and (4) refusing to provide the Union with requested information, we shall order the Respondent to bargain in good faith with the Union, invest its collective-bargaining representatives with sufficient authority to conduct meaningful negotiations with the Union, restore the terms and conditions of employment in effect before the Respondent's unlawful unilateral changes, and make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to furnish to the Union in a timely manner the information it requested on March 19, 2001.

ORDER

The National Labor Relations Board orders that the Respondent, Artesia Ready Mix Concrete, Inc.; The Artesia Companies, Inc.; and Artesia Ready Mix Concrete, Inc./The Artesia Companies, Inc., Tulare, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO, and failing to invest the

[5] See *Allison Corp.*, 330 NLRB 1363, 1367 fn. 23 (2000); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018–1019 (1979), enfd. in relevant part 615 F.2d 1100 (5th Cir. 1980); see also *Ohio Power Co.*, 216 NLRB 987, 990 fn. 9 (1975) (finding that sufficiency of information request should not be determined solely from the request itself, but should be judged in light of the entire pattern of facts available to the employer), enfd. 531 F.2d 1381 (6th Cir. 1981).

[6] See *SS & E Electric, Inc.*, supra; *U.S. Electric*, supra; *Hastings Industries*, supra; and *Tower Automotive*, 322 NLRB 499, 500 (1996).

Respondent's collective-bargaining representatives with sufficient authority to conduct meaningful negotiations with the Union for the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees and drivers employed at Artesia Ready Mix's Tulare, Farmersville, Lemoore, Woodlake (Dry Creek) and Pixley, California facilities; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Diverting income and assets while simultaneously misrepresenting Artesia Ready Mix's financial condition to the Union in order to avoid its obligation to bargain with the Union in good faith.

(c) Unilaterally assigning unit work to nonunit employees.

(d) Failing to provide the Union the relevant and necessary information it requested on March 19, 2001.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO as the exclusive representative of the employees in the above unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

(b) Invest the Respondent's collective-bargaining representatives with sufficient authority to conduct meaningful negotiations with the Union.

(c) Restore the terms and conditions of employment in effect before the Respondent's unlawful unilateral changes, and make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct, as set forth in the remedy section of this decision.

(d) Furnish to the Union in a timely manner the information it requested on March 19, 2001.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Tulare, Farmersville, Lemoore, Woodlake (Dry Creek), and Pixley, California, copies of the notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER SCHAUMBER, dissenting in part.

The General Counsel's motion is in the nature of a motion for default judgment. While"[a] default judgment is unassailable on the merits, [it is so] only so far as it is supported by *well pleaded* allegations assumed to be true." *Nishimatsu Construction Co. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975), citing *Thomson v. Wooster*, 114 U.S. 104 (1885)[1] (emphasis added).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Cited with approval in *Winters v. U. S.*, 207 U.S. 564, 574–575 (1908) (5 of 10 defendants against whom default judgment was entered could not have the judgment set aside unless it was improperly granted because the relief sought was not sufficiently pled); *Ohio Cent. R. Co. v. Central Trust Co.*, 133 U.S. 83, 91 (1890) ("If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof."); *Ryan v. Homecomings Financial Network*, 253 F.3d 778, 780 (4th Cir. 2001) (referring to *Thomson v. Wooster* as the "venerable but still definitive" Supreme Court case addressing well-pled complaints, and holding that despite lienholder's failure to answer, the debtors were not entitled to default judgment because the complaint was not well pled); (*Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1371 (11th Cir. 1997) (holding that district court abused its discretion by granting a default judgment on a complaint that was not well pled because it did not state a valid cause of action)); *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1149 (3d Cir. 1990) (recognizing that under *Thomson v. Wooster*, only the facts alleged in the complaint and not the amount of damages are taken to be true at default judgment); *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1989) (allowing the defendant to challenge the sufficiency of the unanswered complaint on appeal,

Conversely, claims that are not well pleaded cannot support a default judgment. *Thomson v. Wooster*, supra. These principles are not archaic holdovers from the common law or legal niceties that can be dispensed with when it is convenient to do so. On the contrary, the Supreme Court and the lower federal courts have consistently held that "[t]he binding character of the decree . . . renders it proper that this degree of precaution be taken." Id. at 109.[2] It is for this reason that I must respectfully dissent.

It cannot be gainsaid that the General Counsel's complaint did not allege the elements of the unfair labor practice my colleagues find the Respondent committed. This is so because, as here, when information requested by a union is not presumptively relevant to the union's performance as bargaining representative, *the burden is on the union to demonstrate its relevance when the information is requested from the employer*. The Board has clearly held that without such a demonstration, the employer is under no duty to respond. *Excel Rehabilitation & Health Center*, 336 NLRB No. 10, slip op. at 1 fn. 1 (2001) (*Excel*) (not reported in Board volumes). In *Excel*, the Board refused to find a Section 8(a)(5) refusal-to-bargain violation to the extent that information not presumptively relevant was involved, stating as follows:

> The Board has held that subcontracting information like that requested by the Union in item 6 is not presumptively relevant and therefore a union seeking such information must demonstrate its relevance. *Sunrise Health & Rehabilitation Center*, 332 NLRB [1304] (2000); *Associated Ready Mixed Concrete*, 318 NLRB 318 (1995), enfd, 108 F.3d 1182 (9th Cir. 1997). *Here, the Union did not specify in its request why it wanted the subcontracting information, or otherwise demonstrate its relevance.* This, however, does not excuse the Respondent's failure to provide all of the other information requested by the Union, which we have found is presumptively relevant.

Excel, slip op. at 1 fn. 1 (emphasis added).

My colleagues describe the Board's decision in *Excel* as "clearly distinguishable" because "the Respondent filed an answer denying the relevance of the subcontracting information sought by the union." In fact, the Respondent filed an answer in *Excel* denying the relevance of all the information requested, not just the subcontracting information. Leaving that aside, the distinction my colleagues raise is a distinction without a difference. It is the principle of Board law clearly enunciated in *Excel* upon which I rely and which my colleagues do not contest, namely, that an employer has no duty to furnish nonpresumptively relevant information unless the union "*specif[ies] in its request why it wanted the . . . information, or otherwise demonstrate[s] its relevance*." Consequently, an employer cannot properly be held to have violated the Act for a failure to respond to a union request if such a demonstration was not made by the union at the time of the request, whether the issue is raised on a motion for a default judgment, a motion for summary judgment, or in a hearing on the merits.

While I believe that it would be good practice for employers to respond to union requests for information that are not presumptively relevant if only to ask for the necessary showing of relevance, Board law places the burden on the union to demonstrate the information's relevance. Since the General Counsel's complaint did not allege that such a demonstration was made, the complaint is not well pleaded and it cannot properly support the entry of a default judgment against the Respondent. *Thomson v. Wooster*, supra.

My colleagues disagree, observing that the complaint alleges that the information sought was relevant, and adding that by not answering the complaint, Respondent is deemed to have admitted the truth of that allegation. I do not disagree with the majority's observation, but the Respondent cannot be deemed to have admitted that the Union *demonstrated* to the Respondent the information's relevance, which is a necessary element of the violation. If the Union did not make such a demonstration to the Respondent at the time of the request, the Respondent had no duty to respond, and its failure to respond will not support a violation of Section 8(a)(5).

Here, we have no way of knowing whether such a demonstration was made—the motion papers are silent

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and finding that the complaint failed to allege fraud with sufficient particularity under Fed.R.Civ.P. 9(b)); *Cannon v. Exum*, 799 F.2d 751 (4th Cir. 1986) (holding that "default judgment may be lawfully entered only 'according to what is proper to be decreed upon the statements of the bill, assumed to be true,' and not 'as of course according to the prayer of the bill") (quoting *Thomson v. Wooster*); *Compton v. Alton S.S. Co.*, 608 F.2d 96, 105 (4th Cir. 1979) (recognizing *Thomson v. Wooster* as the longstanding rule regarding well pled complaints and default judgment); *Tallman v. Ladd*, 5 F.2d 582, 584 (4th Cir. 1925) (finding the allegations of the bill insufficient to support the district court's decree); *National Sur. Co. v. Leflore County, Miss.*, 262 F. 325, 329 (5th Cir. 1919) (discussing the holdings in *Thomson v. Wooster* and *Winters v. U.S.*, and applying them as the rules regarding well pled complaints and default judgments).

[2] In *Thomson v. Wooster*, supra, the defendant objected to the judgment entered against him. After discussing the English chancery procedure of granting default judgment only after an ex parte examination of the case, the Court observed that under U.S. civil law, default judgment is granted when a properly served defendant fails to appear before the court or answer a complaint. Such judgments are as binding and conclusive as any other judgment rendered by the court. Consequently, care must be taken that complaints are properly pled.

on the issue and, as mentioned, the complaint does not allege that such a demonstration was made—or whether counsel for the General Counsel is simply guilty of sloppy pleading. The law requires—and I respectfully suggest that we, the Board, must require—something more.[3] Apart from the clear instructions on this point in *Thomson v. Wooster* and its progeny, supervisory imperatives require it.

The General Counsel acts as the prosecutorial arm of the agency. When we fail to impose on the General Counsel before entering a default judgment at his request the substantive standards the law requires, we send the wrong message. Further, if the binding and conclusive character of a default judgment entered without an ex parte inquiry into the sufficiency of the movant's evidence prompted the Supreme Court in *Thomson v. Wooster* to remind lower federal courts that default judgments cannot properly be entered on a complaint which is not well pled, a fortiori default judgments should not be entered by the Board on complaints, such as the one here, which do not properly allege a violation of the Act. This is so because default judgments entered by the Board are far more difficult to have set aside than are those entered by a court. Federal courts view default judgments with disfavor, as a drastic remedy to be reserved for extreme circumstances and rare occasions. See, e.g., *American States Ins. Corp. v. Technical Surfacing, Inc.*, 178 F.R.D. 518 (D. Minn. 1998). Accordingly, they set aside defaults for good cause under a flexible, multifactor standard that is sensitive to the equities of particular cases. See, e.g., *KPS & Associates, Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 12 (1st Cir. 2003). In Board cases, by contrast, a failure to file a timely answer all but inevitably results in a default judgment, which is difficult, if not impossible, to have set aside. While theoretically, an untimely respondent can avoid a default judgment on a showing of "good cause," see Board Rules & Regulations Section 102.20, the Board interprets that standard in such a way that "good cause" is virtually never found to exist. The Board's strictness in this regard makes it all the more imperative that a motion for default judgment be denied where, as here, the complaint's allegations fail to make out a cognizable violation of the Act.[4]

[3] In my view, in cases of this nature, it would be appropriate for the General Counsel to attach to his Motion for Summary Judgment, as an exhibit supplementing the complaint, a copy of the union's showing of relevance to the employer at the time of the request for information. Since granting a motion such as the one before us is within the Board's discretion, such an attachment would permit the Board to exercise its discretion on a complete record.

[4] For a full explanation of my views concerning the Board's default judgment practice, including my response to the distinction the majority draws between court and Board litigation, see my dissent in *Patrician Assisted Living Facility*, 339 NLRB 1153 (2003).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO, and WE WILL NOT fail to invest our representatives with sufficient authority to conduct meaningful negotiations with the Union for our employees in the following unit:

> All full-time and regular part-time production and maintenance employees and drivers employed at Artesia Ready Mix's Tulare, Farmersville, Lemoore, Woodlake (Dry Creek) and Pixley, California facilities; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT divert income and assets and misrepresent our financial condition to the Union in order to avoid our obligation to bargain with the Union.

WE WILL NOT unilaterally assign unit work to nonunit employees.

WE WILL NOT fail to provide the Union with relevant and necessary information it requested on March 19, 2001.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO, and put in writing and sign any agreement reached on terms and conditions of employment for our employees and WE WILL invest our bargaining representatives with sufficient authority to conduct meaningful bargaining with the Union.

WE WILL restore the terms and conditions of employment in effect before our unlawful unilateral changes, and make the unit employees whole for any loss of earnings and other benefits attributable to our unlawful conduct, with interest.

WE WILL provide the Union with information it requested on March 19, 2001.

ARTESIA READY MIX CONCRETE, INC., THE ARTESIA COMPANIES, INC., AND ARTESIA READY MIX CONCRETE, INC./THE ARTESIA COMPANIEES, INC.